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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **77-1349**

JOE UNION,
Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals
for the Eighth Circuit**

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on February 21, 1978.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Trial Court erred in finding that the Government had introduced sufficient independent evidence of a conspiracy between the Petitioner and an out-of-court declarant so as to admit said declarant's extrajudicial statements as statements of a co-conspirator.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Rule 801 (d)(2)(E) of the Federal Rules of Evidence:

A statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

2. Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A. Conviction and Sentence.

Petitioner, Joe Union, was convicted by a jury in the United States District Court for the Eastern District of Missouri on

two counts of a fifteen count indictment that charged that Petitioner, Joe Union, and Frank Weems, on or about May 16, 1977, knowingly and intentionally did distribute a quantity of heroin, a schedule I controlled substance in violation of Section 841(a)(1), Title 21, United States Code, and that Petitioner, Joe Union, did conspire with Eddie Earl Johnson, Jr. Robert Lane, Robert Rucker, Leroy Bentley, Terrence Thompson, and Frank Weems to distribute heroin, a schedule I controlled substance, in violation of Section 841(a)(1), Title 21, United States Code.

The District Court imposed sentences of thirteen years and a special parole term of five years on each count.

B. Trial.

The evidence presented by the Government consisted of the testimony of one undercover police officer who testified that he made drug purchases from each of the individuals charged in the conspiracy count as co-conspirators of the petitioner. The officer also testified that on one occasion he had accompanied one of the alleged co-conspirators to a house at 1459 Kealty in St. Louis, a residence from which this co-conspirator had earlier supposedly obtained a quantity of heroin, and while there saw the petitioner who advised him that they were "dead" at the time and that he should come back later.

Over the defendant's objection, the trial court allowed the officer to testify regarding statements of the alleged co-conspirators that they had obtained their heroin from, and worked in behalf of, "Joe."

The officer also testified that on the 16th of May, 1977 he gave the petitioner \$150.00 and in return was given a package of heroin by one of the alleged co-conspirators who was acting at petitioner's direction.

REASONS FOR GRANTING THE WRIT

1. The various Circuits of the United States Courts of Appeals are in conflict over the issue of what constitutes sufficient evidence of a conspiracy between the defendant and an out-of-court declarant so as to justify the introduction of out-of-court declarations as statements of a co-conspirator.

This case involved an alleged conspiracy between the Petitioner, Joe Union, six other named defendants, and other unnamed co-conspirators. At the trial, the Government introduced various out-of-court statements made by these named defendants and the other unindicted co-conspirators.

On appeal, Petitioner challenged the introduction of those statements on the ground that the Government had failed to show, by evidence independent of the statements, that the Petitioner was involved in a conspiracy with the other named or unnamed co-conspirators.

In affirming the conviction the Court of Appeals stated,

"Dickens stated that he purchased heroin from co-conspirators Johnson, Lane, Rucker, Bentley and Thompson. On some occasions Dickens dealt individually with the alleged co-conspirators on other occasions he witnessed concerted activity. The various transactions bore common earmarks, suggesting a shared enterprise. However, Dickens did not testify to any observations of direct contact between the defendant and either Johnson, Lane, Rucker or Bentley . . .

We are satisfied that, independent of the co-conspirator statements implicating the defendant, the prosecution showed a likelihood of illicit association between the defendant and the various declarants." (Opinion at pages 2-3).

This constituted the evidence upon which the Court of Appeals found a prima facie showing of conspiracy between Petitioner and the others so as to justify the admission of the out-of-court declarations as statements of co-conspirators.

Such a hold is clearly inconsistent not only with decisions of other Circuit Courts of Appeals, but also with decisions of the Eighth Circuit.

In *United States v. Mendez*, 496 F.2d 128 (5th Cir. 1974), the United States had introduced statements by defendant's wife to the effect that the defendant was not home because he was importing marijuana from Mexico across the Rio Grande River into Texas. The only evidence linking Mrs. Mendez to any conspiracy, however, was the conversation itself and the fact that she was present during some of the defendant's drug transactions.

In reversing, the Court stated:

" . . . mere knowledge, acquiescence or approval without cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy . . . In order to fasten guilt on one accused of being a co-conspirator it is necessary to prove that he actively participated in the conspiracy charged. . . . Mere association with conspirators is not enough to establish participation in the conspiracy." *Id.* at 130.

And in *United States v. Craig*, 522 F.2d 29 (6th Cir. 1975), the United States Court of Appeals for the Sixth Circuit held that where the only independent evidence of a conspiracy between the defendant and the declarant was that the defendant drove the declarant with the closed box of drugs to Davis' apartment in defendant's truck, that the defendant fled when agents began to move toward the apartment, later abandoning his truck in which a shotgun was found; and that defendant successfully eluded police for about two years, there was not

sufficient independent evidence to admit declarant's statements under the co-conspirator exception.

Clearly, Joe Union was no more involved than the defendants in either of these cases.

Furthermore, a decision from this very Circuit is inconsistent with the opinion handed down in this case.

In *United States v. Frol*, 518 F.2d 1134 (1975) this Circuit Court of Appeals held that evidence showing that a government informant with \$275.00 had approached the defendant as he sat in his car and then returned to the agent that had him under surveillance and gave the agent a balloon containing 3.2 grams of heroin was *insufficient* independent evidence of a conspiracy between the informant and the defendant so as to justify the admission of the informant's out-of-court declarations as statements of a co-conspirator.

Even though the informant was not searched before and after his dealing with the defendant, the evidence was at least as strong as that present in this case, that the defendant was the source of the heroin.

CONCLUSION

Wherefore, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari so that this inconsistency may be remedied.

Respectfully submitted,

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ADDENDUM

— A-1 —

United States Court of Appeals for the Eighth Circuit

No. 77-1654

United States of America,	}	Appeal from the United States District Court for the Eastern District of Missouri
Appellee,		
v.		
Joe Union,	}	
Appellant.		

Submitted: February 14, 1978

Filed: February 21, 1978

Before LAY, ROSS and BRIGHT, Circuit Judges.

PER CURIAM.

The defendant was charged with distribution of heroin and conspiracy to distribute heroin, in violation of 21 U.S.C. § 841 (a)(1). A jury found him guilty on both counts. Concurrent sentences of 13 years and a special parole term of 5 years were imposed on each count. In this timely appeal defendant's sole contention is that the prosecution failed to show, by independent evidence, defendant's involvement with certain of the named conspirators and thus out-of-court statements by these conspirators should not have been admitted against him. Defendant contends that the admission of the coconspirator statements tainted his conviction on both the conspiracy and the substantive counts.

The grand jury charged the following conspiracy:

beginning on or about March 17, 1977 and continuing up to May 18, 1977, in the City of St. Louis, * * * the defendants EDDIE EARL JOHNSON, JR., ROBERT LANE, ROBERT RUCKER, LeROY BENTLEY,

TERRENCE THOMPSON, JOE UNION and FRANK WEEMS did knowingly and wilfully combine, conspire, confederate and agree among themselves and others known and unknown to this Grand Jury to distribute heroin,
* * *

Other than expert witnesses in the identification of controlled substances, the government presented only one witness in support of this charge: Patrick Dickens, an undercover officer in the St. Louis police department.

Dickens testified at length to his numerous meetings with the named conspirators. He stated that he directly observed the defendant acting in concert with coconspirators Thompson and Weems in the distribution of heroin. Dickens further testified that he made a direct purchase of heroin from the defendant. This independent, nonhearsay evidence was uncontradicted. It was clearly sufficient to convict the defendant on both the substantive offense and the conspiracy count. *See, e.g., United States v. Estrada*, 441 F.2d 873, 878 (9th Cir. 1971); *Walker v. United States*, 342 F.2d 22, 25 (5th Cir.), *cert. denied*, 382 U.S. 859 (1965).

Dickens stated that he purchased heroin from coconspirators Johnson, Lane, Rucker, Bentley and Thompson. On some occasions Dickens dealt individually with the alleged coconspirators; on other occasions he witnessed concerted activity. The various transactions bore common earmarks, suggesting a shared enterprise. However, Dickens did not testify to any observations of direct contact between the defendant and either Johnson, Lane, Rucker or Bentley.

Although the defendant objected, the trial court permitted Dickens' testimony regarding statements by the coconspirators that they obtained their heroin from, and worked in behalf of, "Joe." These statements were admissible if there was

substantial independent evidence that a conspiracy existed.
* * * [T]he standard for the admissibility of co-conspira-

tor statements requires the showing of a likelihood of illicit association between the declarant and the defendant. The trial judge determining admissibility preliminarily has wide discretion and must be satisfied only that there is independent evidence, credible and sufficient to support a finding of a joint undertaking.

United States v. Scholle, 553 F.2d 1109, 1117 (8th Cir. 1977). *See also United States v. Kelley*, 526 F.2d 615, 618 (1975), *cert. denied*, 424 U.S. 971 (1976); *United States v. Frol*, 518 F.2d 1134, 1136-37 (8th Cir. 1975).

We are satisfied that, independent of the coconspirator statements implicating the defendant, the prosecution showed a likelihood of illicit association between the defendant and the various declarants. Accordingly, the statements of the coconspirators were properly admitted. Moreover, even if we were to agree with the defendant on the issue, we would be inclined to view any error as harmless. As noted above, the direct observations of Dickens, undisputed by the defendant, clearly established both the substantive offense and an unlawful association with certain of the coconspirators. The prospect of "guilt by transference" was insubstantial. *Cf. Kotteakos v. United States*, 328 U.S. 750 (1946).

The judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.